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Nos. 82-1630 and 82-6695

In The

Supreme Court of the United States

October Term, 1983

TED S. HUDSON,
v. *Petitioner,*
RUSSELL THOMAS PALMER, JR.,
Respondent.

and

RUSSELL T. PALMER, JR.,
v. *Cross Petitioner,*
TED S. HUDSON,
Cross Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF ON BEHALF OF PETITIONER AND CROSS RESPONDENT

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QUESTIONS PRESENTED

1. Does a prison inmate have a reasonable expectation of privacy in prison so that he is entitled to the protection of the Fourth Amendment against unreasonable searches and seizures?

2. If a prisoner, in the context of a prison search, is not protected by the specific terms of the Fourth Amendment, can such protection be found under the general terms of the Fourteenth Amendment?

3. Does the intentional deprivation of property resulting from a random, unauthorized act of a state employee constitute a due process violation when the state provides an adequate postdeprivation remedy?

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ARGUMENT

I.

A RANDOM, UNAUTHORIZED, YET INTENTIONAL DEPRIVATION OF PROPERTY BY A STATE EMPLOYEE DOES NOT VIOLATE THE OWNER'S RIGHT TO DUE PROCESS WHEN THERE EXIST ADEQUATE POSTDEPRIVATION STATE REMEDIES.

A.

Introduction

This case presents the Court with the opportunity to "once more put [its] shoulder to the wheel," *Parratt* v. *Taylor*, 451 U.S. 527, 533 (1981), and set to rest for the

lower courts the question whether the rationale and holding of *Parratt* apply to intentional deprivations of property occasioned by the random and unauthorized acts of state employees.[1]

The cross petitioner, Palmer, contends (1) that an unexcused, intentional taking of property without predeprivation process violates the Fourteenth Amendment even if adequate postdeprivation state remedies exist, (2) that, under Virginia law, the availability of postdeprivation state remedies against state employees is uncertain and (3) that the Due Process Clause protects against deprivations resulting from an abuse of official power.

The cross respondent, Hudson, contends that the reasoning and holding of *Parratt* control the disposition of this aspect of this case and the Court of Appeals below so agreed. Where property loss results from random and unauthorized conduct of state employees, whether intentional or negligent, an adequate postdeprivation state remedy satisfies the requirements of due process. Because Virginia provides several adequate postdeprivation remedies to inmates such as Palmer, Hudson's conduct did not deprive Palmer of property without due process of law. Accordingly, under the facts of this case, the court below properly affirmed the dismissal of Palmer's claim in this regard.[2]

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[1] This brief will address issues involved in both cases, Nos. 82-1630, in which Hudson is petitioner, and 82-6695, in which Hudson is cross respondent.

[2] In his *pro se* complaint, Palmer alleged that during a shakedown search of his locker, Hudson had destroyed certain items of personal property, that Hudson had brought a false charge against him before the prison disciplinary committee, and that Hudson had engaged in a pattern of harassment against him as evidenced by the first two allegations. For purposes of ruling on Hudson's motion for summary judgment, the district court accepted as true all of Palmer's allegations and held that he had failed to state a claim cognizable under 42 U.S.C. § 1983. (App. at 33).

B.

The Rationale Of *Parratt v. Taylor* Controls The Disposition Of This Case.

In *Parratt*, a Nebraska prison inmate, suing pursuant to 42 U.S.C. § 1983, claimed that state prison officials deprived him of property without due process of law by their negligent loss of his hobby kit. This Court first determined that § 1983 does not contain a state of mind requirement and, therefore, suits alleging negligent conduct of state officials are not excluded from the ambit of a § 1983 action. 451 U.S. at 535.

The Court then focused on the elements of a valid due process claim. Those requirements are (1) action under color of state law, (2) the taking of property and (3) the failure to afford an appropriate procedure capable of providing a remedy in a meaningful manner and at a meaningful time. In considering these factors, the Court found in *Parratt* that the prison officials acted under color of state law; the hobby kit fell within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation of property. *Id.* at 536. But, focusing upon the last element, the Court held that the provision of a meaningful postdeprivation state remedy satisfied the requirements of due process. *Id.* at 541. It followed then that the guard's negligent conduct did not violate the inmate's constitutional right to due process.

In considering the last element, the Court in *Parratt* recognized that its Fourteenth Amendment cases have squarely rejected the proposition that due process *always* requires the state to provide a hearing prior to the initial deprivation of property.[3] *Id.* at 540. The Court

[3] Cross petitioner's contrary assertion that the Fourteenth Amendment mandates predeprivation notice and opportunity to be heard,

found that Nebraska provided a postdeprivation remedy through its tort claims act, and this remedy was available to the prisoner. The Court then directed its inquiry to whether, under the facts of that case, the Due Process Clause required a predeprivation hearing for a random taking of property. Upon consideration of the practical inability of the state to control all employee misconduct, the Court found that a postdeprivation remedy, such as the Nebraska tort claims procedure, was adequate to satisfy due process requirements where random and unauthorized conduct caused the loss. *Id.* at 541.

In distinguishing its line of cases requiring a predeprivation hearing, the Court reasoned that:

> The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. *In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is in almost all cases beyond the control of the State.* Indeed, in most cases it is not only impractical, but impossible, to provide a meaningful hearing before the deprivation.

Id. (emphasis added). Under the facts of *Parratt*, the due process requirement of a meaningful hearing at a meaningful time was satisfied by the post deprivation remedy.

In formulating its decision in *Parratt*, this Court substantially adopted the language and analysis of then Judge

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Brief for Palmer at 5, is, as *Parratt* indicates, simply at odds with this Court's decisions.

Stevens in *Bonner* v. *Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978), where he stated:

> It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against "State" deprivations of property; in the latter situation, however, even though there is action "under color of" state law sufficient to bring the amendment into play, *the state action is not necessarily complete*. For in a case such as this the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that *the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.*

517 F.2d at 1319 (emphasis added) (footnotes omitted).

The reasoning and holding of *Parratt* were confirmed by this Court in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan*, the Court found a due process violation when the terms of an Illinois statute deprived an individual of the opportunity to pursue an employment discrimination claim. The Court emphasized that the Fourteenth Amendment requires only an opportunity for a hearing appropriate to the nature of the deprivation at a meaningful time and in a meaningful manner. *Id.* at 437. In an opinion consistent with *Parratt*, Justice Blackmun wrote for the Court that a deprivation of property resulting from a state procedure, rather than from the random and

unauthorized action of a state employee, requires a pre-deprivation hearing, regardless of the availability of post-deprivation remedies. *Id.* at 435.

Turning to the case at hand, Palmer contends that *Parratt* is not applicable to this case because the facts in *Parratt* involved a negligent deprivation of property and not an intentional taking. Although the alleged existence of Hudson's intent is a distinction between the claim presented by Palmer and the claim in *Parratt*, it is a difference without substance.

The analysis in *Parratt* applies equally to intentional and negligent deprivations of property that implicate due process guarantees. The due process analysis undertaken in *Parratt* did not involve consideration of the presence or absence of intent. 451 U.S. at 534-35. The holding in *Parratt* simply makes no distinction between negligent property deprivations and intentional torts. The ultimate inquiry must focus, not on whether there was a deprivation of property, but on whether the established deprivation of property was without due process of law. *Id.* at 537. A taking resulting from negligence is no less a deprivation to the owner than one resulting from intentional action. And a taking resulting from intentional action does not deprive the owner of more than does a taking resulting from negligence. The ultimate issue, as suggested above, is whether the owner was afforded a meaningful hearing at a meaningful time.

The state is just as unable to control an employee's random and unauthorized, intentional misconduct as it is an employee's negligent misconduct. It is this inability to control and prevent the random, wrongful act that justifies the conclusion that the provision of a postdeprivation remedy avoids the unconstitutional taking without process.

Clearly, the measure of the employee's act on a scale of negligence is immaterial. The key is *whether the state's action is complete. Bonner*, 517 F.2d at 1319. In situations in which the state has provided meaningful post-deprivation remedies, the state conduct is not complete upon the conclusion of the isolated, random, unauthorized misconduct of an employee. Thus, because due process is provided at a meaningful time, there is not a constitutional deprivation of property without due process of law.

Further support for the application of the *Parratt* doctrine to intentional torts is found in the Court's reliance in *Parratt* upon its decision in *Ingraham* v. *Wright*, 430 U.S. 651 (1977). *Parratt* cites with approval the *Ingraham* holding that intentional deprivations of liberty caused by corporal punishment in public schools do not violate the Fourteenth Amendment because postdeprivation state common-law remedies were sufficient to satisfy due process requirements. 451 U.S. at 543 (citing *Ingraham*, 430 U.S. at 682). After specifically recognizing *Ingraham* as an intentional tort case, the Court in *Parratt* cited that decision without qualification as consistent with its *Parratt* analysis. 451 U.S. at 542.

If the Court had wished to limit the holding of *Parratt* to torts resulting only from negligence, it certainly had the opportunity to do so. The Court's failure to so limit *Parratt* and its reliance upon *Ingraham* strongly suggest that *Parratt* is applicable to cases such as the one now before the Court. Moreover, the vast majority of United States Courts of Appeals that have touched upon this issue have found *Parratt* applicable to intentional as well as negligent conduct.[4] Those courts have found no logical reason for

[4] *Wolf-Lillie v. Sonquest*, 699 F.2d 864 (7th Cir. 1983); *Palmer v. Hudson*, 697 F.2d 1220 (4th Cir. 1982); *Engblom v. Carey*, 677 (footnote continued)

restricting the doctrine in *Parratt* to negligent conduct only.

The few courts restricting *Parratt* to cases alleging only negligent conduct often cite Justice Blackmun's concurring opinion in *Parratt* for the proposition that meaningful post-deprivation remedies are not adequate in cases alleging intentional deprivation of property by state employees.[5] Justice Blackmun did clearly express the concern that the *Parratt* holding should not be automatically extended to property losses resulting from a state official's intentional acts. He most assuredly did not, however, foreclose the possibility of such an extension in those situations in which the state was unable to control the isolated, random, unauthorized acts of the employee. *See Parratt*, 451 U.S. at 545-46 (Blackmun, J. concurring). The applicability of *Parratt* must be gauged by the facts presented. It is respectfully suggested that Justice Blackmun's opinion requires no more.[6]

F.2d 957 (2d Cir. 1982); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981); *see Wolf-Lillie v. Sonquiest*, 699 F.2d 864 (7th Cir. 1983) (Sheriff's conduct was arguably intentional deprivation of property); *cf. Burtnieks v. New York*, No. 82-7733 (2d Cir. Aug. 26, 1983) (available Nov. 1, 1983, on WESTLAW, FED database) (if intentional taking made predeprivation hearing impractical, *Parratt* can apply); *Coleman v. Faulkner*, 697 F.2d 1347 (10th Cir. 1982) *(Parratt* applicable to intentional seizure of money, but not necessarily for other intentional deprivations). *Contra Brewer v. Blackwell*, 692 F.2d 387 (5th Cir. 1982). In *Brewer*, the Fifth Circuit attempted to draw a distinction between negligent property deprivations and those involving intentional acts. Yet the court did not provide any persuasive reasoning, only stating the conclusion that negligent property deprivations are somehow quantifiably different from intentional takings.

[5] *See, e.g., Brewer v. Blackwell*, 692 F.2d 387, 394 (5th Cir. 1982).

[6] Also implicit in Justice Blackmun's concurring opinion is the suggestion that the state should not take comfort in *Parratt* and be less vigorous in deterring unauthorized conduct. In this regard, it is important to note that Palmer does not even intimate that the state acquiesced in Hudson's conduct.

Palmer seeks to avoid the *Parratt* analysis in this case by contending that a predeprivation hearing is not impossible because the intentional tort-feasor knows he is going to destroy the property prior to the destructive act. Brief of Palmer at 8. By arguing that a predeprivation hearing is possible, he concludes that predeprivation process is required. It is, however, both naive and illogical to suggest that the employee who intends to commit an unauthorized and wrongful act is bound to provide a hearing before he commits such an act.[7]

Parratt rests upon a practical, realistic understanding of the functioning of government. Palmer simply ignores that foundation. Furthermore, *Parratt* recognizes that the process due by virtue of the Fourteenth Amendment is owed by the *state*, not by a state employee. 451 U.S. at 541.

In the analysis chosen by the Court, it found as dispositive whether the taking was a result of random and unauthorized misconduct or of conduct pursuant to established state procedure. *Id.* at 541. While the Court provides no specific definition of "random and unauthorized conduct," its parameters can be discerned from examining the facts and rationale underlying *Parratt*. In that case,

[7] Significantly, Palmer admits that it is unlikely that a predeprivation hearing would be given by a state employee who intends to commit a random and unauthorized act. Brief of Palmer at 7-8. Yet, he submits such process is mandated by the Fourteenth Amendment simply because it is theoretically possible. This academic argument has been specifically addressed and rejected by the Court on numerous occasions. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court found constitutionally adequate the post-discharge remedies afforded a terminated civil service employee. Moreover, in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court held that social security benefits could be terminated even though the only opportunity for a hearing came after the benefits stopped. In those cases, a hearing prior to termination was arguably possible, but the mere possibility was substantially outweighed by its impracticality, the marginal reduction of improper actions which would result, the significant intrusion involved, and the sufficiency of remedies that already existed.

the loss of the prisoner's property resulted from the negligent conduct of state employees. Because the loss was not the result of a state procedure, the Court found that "the state cannot predict precisely when the loss will occur," *id.*, and noted that it would be difficult to conceive of how the state could thus provide a meaningful predeprivation hearing. *Id.*

Applying the *Parratt* analysis to the present case will yield the same conclusion. The intentional taking claimed by Palmer was totally unpredictable by the state because the alleged conduct was not in accordance with any procedure or direction by the state, was unforeseeable and beyond the control of official action.[8] (App. at 7-8). Officer Hudson's alleged misconduct of destroying Palmer's property was just as unauthorized, unpredictable, and beyond the control of the state as the negligent conduct of *Parratt*.

Consequently, *Parratt* dictates that a meaningful postdeprivation remedy was all that the state could reasonably be expected to provide Palmer and, therefore, all that the Fourteenth Amendment required. It follows that if Virginia law provides a meaningful postdeprivation remedy, then Palmer has not been deprived of his property without due process of law within the meaning of the Fourteenth Amendment.

C.
Virginia Law Provides Adequate Postdeprivation Remedies.

That Virginia provides adequate procedures and remedies for the conduct alleged cannot be seriously questioned. As

[8] The Virginia Department of Corrections, *Employee Standards of Conduct* (July 1, 1981), provide that abuse of inmates by Department employees is an offense of such a serious nature that a first occurrence should normally warrant removal from employment. Add. at 1.

noted by the United States District Court below, adequate state remedies were available through the common-law actions for conversion or detinue.[9] (App. at 31). *See Irshad* v. *Spann*, 543 F. Supp. 922 (E.D. Va. 1982). In addition, Palmer had an adequate remedy available under the then applicable inmate grievance procedure of the Virginia Department of Corrections.[10] *See Phelps* v. *Anderson*, 700 F.2d 147 (4th Cir. 1983). Because these remedies could have fully compensated him, Palmer was provided with process sufficient to meet the guarantees provided in the Fourteenth Amendment.[11]

Palmer, on the other hand, claims that relief is "uncertain" in state courts because the defense of sovereign immunity "may" be available to state employees charged with intentional torts. Brief for Palmer at 11-14.[12] This

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[9] Virginia law permits indigents to proceed *in forma pauperis* in court actions without paying fees or costs and gives courts the authority to assign counsel in such cases. Va. Code § 14.1-183 (1978).

[10] It is of interest that Palmer did not seek to avail himself of any of these remedies. Instead, within two hours of being served by Hudson with notice he, Hudson, was charging Palmer with infraction of a prison rule, Palmer completed a *pro se* complaint which he executed and eleven days later filed in United States District Court. See Palmer's § 1983 complaint (App. at 8), which was executed on September 17 and refers to Hudson's conduct at 10:00 p.m. that day.

[11] In addition to these remedies, Virginia now has a State Tort Claims Act, Va. Code §§ 8.01-195.1 to -195.8 (Supp. 1983), which waives the sovereign immunity of the Commonwealth in certain situations.

[12] To support this proposition, Palmer cites *Banks* v. *Sellers*, 224 Va. 168, 294 S.E.2d 852 (1982); *First Virginia Bank-Colonial* v. *Baker*, 225 Va. ____, 301 S.E.2d 8 (1983); and *Bowers* v. *Department of Highways*, 225 Va. ____, 302 S.E.2d 511 (1983). Significantly, none of these cases involved an intentional tort as does the present case. *Banks* dealt with an allegation that a school principal negligently failed to provide a safe environment for a student. *Bowers* involved a claim of negligent construction of a culvert (footnote continued)

argument fails to acknowledge settled Virginia law. The Supreme Court of Virginia and each federal court in Virginia considering the issue have uniformly held that sovereign immunity is not a bar to recovery from state employees accused of intentional torts.

In *Elder* v. *Holland*, 208 Va. 15, 155 S.E.2d 369 (1967), the Supreme Court of Virginia held that a state police officer could not claim sovereign immunity as a defense to a claim of liability for defamatory words spoken while performing his duties. In so holding, the court said, "we must conclude that a State employee may be held liable for intentional torts." 208 Va. at 19, 155 S.E.2d at 372-73.

Twelve years later, in *Short* v. *Griffitts*, 220 Va. 53, 255 S.E.2d 479 (1979), the Virginia Supreme Court was again faced with a claim of immunity in a negligence case. While that case is not directly on point, the court did take the opportunity to affirm its holding in *Elder*, stating that "[w]e concluded [in *Elder*] that a State employee was also liable for intentional torts." *Id.* at 56, 255 S.E.2d at 481. Based upon these holdings of the Supreme Court of Virginia, there is simply no confusion in Virginia law on this issue. Sovereign immunity is not available to bar recovery for an intentional tort.

The federal district courts applying Virginia law have consistently recognized that state employees are not immune from liability for intentional torts. *Irshad* v. *Spann*, 543 F. Supp. 922, 928 (E.D. Va. 1982) ("A State employee who acts intentionally . . . is not immune from liability in his individual capacity.")[13]; *Holmes* v. *Wampler*,

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and *First Virginia* concerned an allegation of misfeasance by a deputy court clerk for improperly indexing a lien instrument. Thus, they are not relevant to Palmer's assertion that the law concerning intentional tort-feasors is unclear.

[13] The court in *Irshad* interestingly notes that in § 1983 cases (footnote continued)

546 F. Supp. 500, 504 (E.D. Va. 1982) ("In Virginia, a state official does not enjoy immunity for an intentional tort"); *Frazier* v. *Collins*, 544 F. Supp. 109, 110 (E.D. Va. 1982) ("Virginia does not extend immunity to its officials...for intentional torts"); *Whorley* v. *Karr*, 534 F. Supp. 88, 89 (W.D. Va. 1981) ("Sovereign immunity protects no government official who commits an intentional tort.").

In addition to the state common law and statutory remedies, the Virginia Department of Corrections Inmate Grievance Procedure also provided adequate postdeprivation remedies to an inmate who had been deprived of property.[14] See *Phelps* v. *Anderson*, 700 F.2d 147 (4th Cir. 1983). The inmate grievance procedure allows the prisoner to grieve actions taken by prison officials and permits compensation for property destroyed through their misconduct. *See id.* at 149 n.5; *Irshad*, 543 F. Supp. at 927. In *Phelps* v. *Anderson* and in *Irshad* v. *Spann*, the courts found the grievance procedure to provide adequate due process under the standards of *Parratt* v. *Taylor*. They concluded that

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state officials are accorded a qualified good faith immunity from damages. Thus, a plaintiff suing a state official in a § 1983 case and alleging a deprivation of property without due process of law resulting from the employee's negligent action will probably be precluded from recovery because of the employee's good faith.

[14] Although not applicable to the loss alleged in this case, effective October 12, 1982, Virginia instituted an inmate grievance procedure certified by the Attorney General of the United States as being in compliance with the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e (1976 ed, Supp. IV). *See Phelps* v. *Anderson*, 700 F.2d at 149, n.3. This certified procedure is essentially the procedure available to inmate Palmer at the time of his loss of property and provision is made for providing monetary relief as a potential remedy. *See generally, Patsy v. Board of Regents*, 102 S.Ct. 2557, 2564-66 (1983); *Parratt* v. *Taylor*, 451 U.S. at 553, n.13 (Powell, J. concurring). A copy of the old and new inmate grievance procedures and the United States Attorney General's certification are included in the Addendum at pp. 15, 4, 21, respectively.

"[t]his administrative remedy is sufficient to satisfy due process," because it could have fully compensated a prisoner for any property losses he suffered. *Irshad*, 543 F. Supp. at 927. It is, therefore, beyond doubt that Virginia provided Palmer with adequate postdeprivation remedies for his property loss.

D.

The Due Process Clause Does Not Protect Against Every Claim Of Governmental Abuse Of Power.

In an effort to shore up his due process claim, Palmer seeks to invoke a constitutional guarantee against governmental abuse of power. Brief of Palmer at 14-21. Whatever else can be said about such a cryptic notion, it can be safely stated that an official's abuse of power does not, as an abstract proposition, necessarily violate or even touch upon the Constitution.

Certainly, an abuse of power is not, standing alone, actionable under § 1983. As the Court stated in *Baker* v. *McCollan*, 443 U.S. 137, 146 (1979), "section 1983 imposes liability for violations of rights protected by the Constitution [and statutes], not for violations of duties of care arising out of tort law." Moreover, in *Paul* v. *Davis*, 424 U.S. 693, 701 (1976), this Court clearly held that the Due Process Clause cannot be used as the source of a font of tort law.

While on many occasions a violation of constitutional rights may stem from an abuse of power, it is the violation of the constitutional right, not the naked abuse of power, which gives rise to the § 1983 claim. To embrace the concept that the due process clause protects against all governmental abuses of power would require reversal of a substantial body of Due Process law, and subject federal courts to the possibility of judging every tortious state act.

II.

A PRISONER DOES NOT HAVE A CONSTITUTIONALLY PROTECTED RIGHT OF PRIVACY WHICH INSULATES HIM FROM SEARCH BY A PRISON GUARD.

In his Motion Against Summary Judgment, Palmer stated he "realizes that routine shakedowns are necessary to properly run a prison. . . ." (App. at 21). In his brief, Palmer seems to acknowledge that random prison searches are permissible, provided they are for a legitimate purpose such as seeking contraband. Brief of Palmer at 24. Palmer next suggests, however, that if the search is for impermissible reasons, such as harassment, then it is unreasonable and violates the Fourth Amendment. Thus, Palmer would turn the existence of a constitutional violation, not upon the nature of the action and its consequences upon the inmate, but solely upon the subjective intent of the perpetrator. Such a rule cannot work.

The Court of Appeals' approach was somewhat different. Whether resting upon a Fourteenth Amendment right of privacy or a Fourth Amendment "legitimate expectation of privacy," the Court found that a right of privacy exists in prison and that right was entitled to constitutional protection. Such an approach is at odds with the analysis embraced by this Court in *Katz* v. *United States*, 389 U.S. 347 (1967), and applied as recently as *United States* v. *Knotts*, 103 S.Ct. 1081 (1983).

While "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . .," *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972), it is not the only environment in which a person is accorded Fourth Amendment protection. But, it is clear that protection does not exist when the person does not subjectively anticipate it and society is not

prepared to recognize it as reasonable. *Smith* v. *Maryland*, 442 U.S. 735, 740-741 (1979) (cited in *Knotts*, 103 S.Ct. at 1085).

With respect to the first test, it is clear from his own pleadings that Palmer does not subjectively expect to be free of searches while confined in prison. What he expects is simply to be free from harrassment, and he may obtain such relief without burdening the Fourth Amendment.[18]

With respect to the second test, society is not prepared to accord inmates freedom from careful surveillance—surveillance which is for the protection and benefit of the inmate, the guard and society. While inmates admittedly retain certain constitutional rights, they have surrendered the right to be free from scrutiny and surveillance. They may have an interest in protection from undue intrusion in their affairs by other inmates, but society has not extended a veil between the prisoner and the watchful eye of the guard. For this Court to do so now is in neither the best interest of the inmate nor the best interest of society.

CONCLUSION

In cases where a deprivation of private property has occurred at the hands of the State, this Court, through Justice Brandeis, has observed that "mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Phillips* v. *Commissioner*, 283 U.S. 589, 596-97 (1931). Indeed, this Court has never held

[18] Harrassment, as indicated in Brief on Behalf of Petitioner at 18, may be addressed in several ways. If it rises to the level of a constitutional violation, it may be attacked under the Eighth Amendment. Similarly, if it involves a taking of liberty without due process, it may be attacked under the Fourteenth Amendment. There are also various tort theories available under state law and, finally, the inmate may obtain relief under the Inmate Grievance Procedure.

that a predeprivation hearing is mandated in all cases involving property losses. Moreover, this Court's decisions make clear that adequate postdeprivation process will satisfy the dictates of the Due Process Clause where the property loss results from a public emergency or where it is impractical to provide a predeprivation hearing.

In *Parratt* v. *Taylor*, 451 U.S. 527 (1981), the Court held that a claim for relief under 42 U.S.C. § 1983 had not been stated where Nebraska prison officials by random and unauthorized conduct negligently lost a prisoner's property, because the state provided an adequate postdeprivation remedy which could fully compensate the prisoner for his loss. This Court emphasized the random and unauthorized nature of the taking and the practical inability of the state to prevent it. Therefore, the Court reasoned that the provision of an adequate postdeprivation remedy avoided the conclusion that the taking violated the Fourteenth Amendment.

The same rationale is fully applicable here. The only difference of significance between *Parratt* and the instant case is that this case involves an allegation of an intentional taking. An intentional taking resulting from the random and unauthorized acts of a guard is not more predictable or controllable by the state than an unintentional taking. Accordingly, analysis must focus on the adequacy of the postdeprivation remedies afforded by Virginia. These remedies do satisfy the requirements of the Fourteenth Amendment. Thus, the holding in *Parratt* controls the disposition of this case. Accordingly, that portion of the decision of the Court of Appeals should be affirmed.

Finally, there can be little doubt that Palmer himself recognizes the inherent limitations on an expectation of privacy in prison. Brief of Palmer at 22-23. Society is un-

able to accord him such a right and, under the decisions of this Court, as a matter of law, none should be found. The Fourth Amendment does not obtain in prison, and the decision of the Court of Appeals on this issue should be reversed.

Respectfully submitted,
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